CAHAYA IDEAL (M) SDN BHD *a*

v.

ORANG-ORANG YANG MENGENALI DIRI SEBAGAI 'PONGA' & ORS *b*

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO: 24-263-1998(1)]
6 APRIL 1999

LAND LAW: *Indefeasibility of title and interests - Registered owner - Whether property was free from all adverse claims or encumbrances - Section 340 of the National Land Code 1965* *c*

LAND LAW: *Trespass - Unlawful occupation - Occupation of land for 20 years - No endorsement or registration - Whether such occupation entitles the defendants any interest* *d*

The plaintiff was the registered owner of a piece of property in Johor Bahru ('the property') which ownership was registered in 1992. The defendants were the occupiers of the property. The plaintiff alleged that the defendants were trespassers and were occupying the property without its consent. The plaintiff *e* thereafter demanded vacant possession of the property but the defendants refused to vacate. The 1st defendant contended that his parents were ex-employees of Permas Estate which was owned by the National Land Finance Co-operative Society Limited ('the Co-op') under the Green Book Scheme, and that the property was part and parcel of Permas Estate. The defendants *f* further alleged that with the consent of the Co-op, the 1st defendant's parents had cleared the forest to cultivate vegetables under the Green Book Scheme and, subsequently, the defendants had built houses thereat and continued to occupy the property. The 1st defendant also submitted to the court two 'surat akuans' from the village heads which showed that he had stayed on the said *g* property for almost 19 years.

Held:

[1] There was no proof in respect of the size and the exact location of the portion of the land that was intended to be given to the 1st defendant's *h* parents or to the defendants; the existence of any consideration and how that consideration was to be fulfilled; and the method whereby the land was to be transferred or conveyed to the defendants. Even the alleged interests of the defendants in the land were uncertain.

i

[2] The defendants had admitted that consent was given to the ex-employees of Permas Estate to cultivate vegetables and not to occupy the property. Only a revocable licence to cultivate the property was granted.

[3] There was no sale and purchase agreement and neither was there any lease or tenancy being created by the Co-op's letter. The Co-op's letter was not a memorandum of transfer of land as envisaged in Form 14A of the National Land Code 1965 ('the NLC') nor was it a memorandum of lease of land as reflected in Form 15A of the NLC. There was no endorsement of tenancy on the register document of title nor any entry of caveat by the defendants on the property. The defendants had no interests in the property capable of registration under the NLC.

[4] Frustration must be an occurrence subsequent to the formation of the contract. Once a contract is discharged by frustration, it does not become voidable, rather the contract comes to an end forthwith and automatically. As such, whatever agreements the defendants had with the Co-op had been frustrated and had become void since they became incapable of performance and unlawful once the plaintiff became the registered proprietor of the property.

[5] Once the plaintiff became the registered proprietor of the property, the title became indefeasible under s. 340 of the NLC and was free of all adverse claims or encumbrances.

[6] The fact that the defendants had been in occupation of the land for the last 20 years was irrelevant and immaterial. It did not confer any interests on the defendants nor did it improve the defendants' interests in the land.

[7] On proprietary estoppel, the defendants were required to prove three essential elements, namely, assurance, reliance and detriment. The defendants failed to establish the three requisites. There was no evidence that the defendants had been induced or encouraged or given the expectation which prompted them to expend money to build the houses. The defendants acquired no equity by that expenditure.

[8] Once the plaintiff proved its title and intention to regain possession, it was for the defendants to prove that they could set out a title or a right to possession inconsistent with the plaintiff's ownership. The burden would be on the defendants to show that they had the right to occupy the land on a balance of probabilities.

[9] The plaintiff's delay in filing an originating summons for vacant possession could not be construed to mean that the plaintiff had consented to the defendant's occupation of the land.

[10] Section 3(1) of the Civil Law Act 1956 is only applicable if there is no written law in force in Malaysia on the subject matter at hand. The legal draftsmen incorporated a device in s. 3(1) to circumvent the wholesale importation of the rules of equity as administered in England.

[11] If a person enters without licence or consent he is a trespasser *ab initio*. The phrase 'remained in occupation without his licence or consent' envisages occupation which is lawful at the inception but has subsequently ceased to be so. This is true in the case where a licence, previously given, has been terminated or expired by effluxion of time or upon death. The letter from the Co-op gave the 1st defendant's parents consent to occupy the property but upon the death of the 1st defendant's parents that consent expired automatically. There was nothing left for the defendants to hold on to and O. 89 of the RHC was the right remedy for the plaintiff.

[Plaintiff's application granted.]

Case(s) referred to:

A'Court v. Cross [1825] 3 Bing 329 ***(refd)***
Astra Trust v. Adams & Williams [1969] 1 Llyod's Rep 81 ***(refd)***
Beh Lee Liang v. Chew Sah Suak [1996] 1 CLJ 173 ***(foll)***
Bohari Taib & Ors v. Pengarah Tanah Galian Selangor [1991] 1 MLJ 343 ***(refd)***
Chandrasekera v. R [1936] AC 220 ***(refd)***
Cholmondeley v. Clinton [1820] 2 J & W 1 ***(refd)***
Chuan Seng Sdn Bhd v. Ooi Boon Lai & Ors [1993] 3 CLJ 153 ***(refd)***
Cracknall v. Janson 11 Ch D 12 ***(refd)***
Davis Contractors Ltd v. Fareham UDC [1956] AC 696 ***(refd)***
Devi v. Francis [1969] 2 MLJ 169 ***(refd)***
Frazer v. Walker & Ors [1967] 1 All ER 649 ***(refd)***
G Scammell & Nephew Ltd v. Ouston [1941] AC 251 ***(refd)***
Goddard v. Parr 3 WR 633 ***(refd)***
Hillas & Co Ltd v. Arcos Ltd [1932] 147 LT 503 ***(refd)***
Hirji Mulji v. Cheong Yue Steamship Co Ltd [1926] AC 497 ***(refd)***
Hotel Holdings (M) Sdn Bhd v. Chai Him & Ors [1997] 4 MLJ 601 ***(refd)***
Inmetec Sdn Bhd v. Yong Tai Hoong & Anor [1995] 1 MLJ 390 ***(refd)***
Joseph Constantine Steamship Line Ltd v. Imperial Smelting Corporation Ltd [1942] AC 154 ***(refd)***
Kabra Holdings Sdn Bhd v. Ahmad Shahlan & Ors [1992] 2 CLJ 817 ***(refd)***
Kepong Prospecting Ltd v. Schmidt [1968] AC 810 ***(refd)***
Kernick v. Kernick 12 WR 335 ***(refd)***
Khoo Than Sui v. Chan Chiau Hee [1976] 1 MLJ 25 ***(refd)***
Lee-Parker v. Izett [1972] 1 WLR 775 ***(refd)***
Lim Ah Oh & Anor v. R [1950] MLJ 269 ***(refd)***
Majlis Amanah Rakyat (MARA) v. Tam Seek Hong & Ors [1994] 2 AMR 25 ***(refd)***
Maritime National Fish Ltd v. Ocean Trawlers Ltd [1935] AC 524 ***(refd)***

Mohd Ali Jahn Yusop Sahibjahn & Anor v. Zaleha Mat Zin & Anor [1995] 2 CLJ 961 ***(refd)***
Myers v. DPP [1965] AC 1001 ***(refd)***
National Carriers Ltd v. Panalpina (Northern) Ltd [1981] AC 675 ***(refd)***
Oh Kuang Liang v. Associated Wood Ind Sdn Bhd [1995] 4 MLJ 390 ***(refd)***
Osmaston v. Association of Land Financiers [1878] WN 101 ***(refd)***
PJTV Denson (M) Sdn Bhd v. Roxy (M) Sdn Bhd [1980] 2 MLJ 136 ***(refd)***
Portland Managements Ltd v. Harte & Ors [1976] 1 All ER 225 ***(refd)***
Punca Klasik Sdn Bhd v. Foh Chong & Sons Sdn Bhd & Ors [1998] 1 CLJ 601 ***(refd)***
Punca Klasik Sdn Bhd v. Liza James & Ors [1996] 3 CLJ 932 ***(refd)***
Punca Klasik Sdn Bhd (No 2) [1996] 5 MLJ 92 ***(refd)***
Ramli Zakaria & Ors v. Government of Malaysia [1982] 2 MLJ 257 ***(refd)***
Ramsden v. Dyson [1866] LR 1 HL 129 ***(refd)***
Re Jessop [1910] WN 128 ***(refd)***
Registrar of Titles, Johore v. Temenggong Securities Ltd [1976] 2 MLJ 44 ***(refd)***
Rossage v. Rossage & Ors [1960] 1 ALL ER 600 ***(refd)***
Salim Ismail & Ors v. Lebbey Sdn Bhd [1997] 2 AMR 1115 ***(refd)***
Segar Restu (M) Sdn Bhd v. Wong Kai Chuan [1994] 4 CLJ 757 ***(refd)***
Shaheen Abu Bakar v. Perbadanan Kemajuan Negeri Selangor & Other Cases [1996] 2 CLJ 965 ***(refd)***
Sidek Hj Muhamad & Ors v. The Government of the State of Perak & Ors [1982] 1 MLJ 313 ***(refd)***
T Damodaran v. Choe Kuan Hin [1979] 2 MLJ 267 ***(refd)***
Thomas v. Thomas [1842] 2 QB 851 ***(refd)***
Toh Kheng Heng & Anor v. Ahmad Fauzi Mohd Taufek [1994] 1 MLJ 356 ***(foll)***
Tsakiroglou & Co Ltd v. Noblee Thorl Gmbh [1962] AC 93 ***(refd)***
United Malayan Banking Corp Bhd & Anor v. Pemungut Hasil Tanah, Kota Tinggi [1984] 2 MLJ 87 ***(refd)***
Verama v. Amarugam & Anor [1982] 1 MLJ 107 ***(refd)***
Warner v. Mosses [1881] WN 69 ***(refd)***
Wishart v. National Association of Citizen's Advice Bureaux [1990] 1 CR 794 ***(refd)***
Yap Pun & Anor v. Orang-orang Yang Tidak Dikenali Yang Menduduki Di atas Tanah Yang Dikenali Sebagai Lot No 108, Seksyen 92A, Bandar Kuala Lumpur [1998] 6 MLJ 270 ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 3(1)
Contracts Act 1950, ss. 30, 52(2), 57(1), (2)
Evidence Act 1950, s. 103
Limitation Act 1953, s. 9(1)
National Land Code 1965, ss. 5(d), 205(1), 206(3), 207(1), 214(1)(a), 215(3)(a), 320(1)(b), 323(1)(a), 340
Rules of the High Court 1980, O. 2 rr. 1(1), 2(1), O. 41 r. 6, O. 89 rr. 1, 4(1)
Specific Relief Act 1950, s. 21
Rules of the Supreme Court [UK], O. 38 r. 3

Other source(s) referred to:
Clerk & Lindsell On Torts, 16th edn, p 1334
Sarkar's Laws of Evidence, 13th edn, p 51

For the plaintiff - Goh Mey Foon; M/s Leng & Co
For the defendants - EM Yohevel; M/s Nassir & Co

Reported by Farah Naim

JUDGMENT

Introduction

On 6 August 1998 the parties magnanimously agreed that this judgment would bind ten (10) other originating summonses, namely:

(1) OS 24-275-1998(1) where the defendants were Gopal a/l Panikar and nine others;

(2) OS 24-276-1998(1) where the defendants were Manisvaram a/l Subramaniam and two others;

(3) OS 24-277-1998(1) where the defendants were Licmy a/p R. Sinna and four others;

(4) OS 24-279-1998(1) where the defendants were Panickiraji a/l Gopal and four others;

(5) OS 24-278-1998(1) where the defendants were Koonnusagaran a/l Murugan and five others;

(6) OS 24-488-1998(1) where the defendants were Ravindran a/l Raman and nine others;

(7) OS 24-492-1998(1) where the defendants were Narayenna Moorthy a/l Thaliappan and eight others;

(8) OS 24-693-1998(1) where the defendants were Ambok Sulung bin Hj. Ambok Attak and two others;

(9) OS 24-694-1998(1) where the defendants were Abdul Rahim bin Ayub and two others; and

(10) OS 24-695-1998(1) where the defendants were Azhar bin Ahmad and another.

Subsequent affidavits filed by the defendants revealed that the facts in the last three cases, namely:

(1) OS 24-693-1998(1);

(2) OS 24-694-1998(1); and

(3) OS 24-695-1998(1).

were different from the facts of the present case and on 14 September 1998 the parties agreed that these three cases were to be heard separately by this court on 27 November 1998, 28 November 1998 and 30 November 1998 respectively. After hearing submissions on those dates, this court granted order in terms on 30 November 1998.

In regard to OS 24-492-1998(1) where the defendants were Narayenna Moorthy a/l Thaliappan and eight others, the parties had agreed on 6 August 1998 that the decision in the present case would be binding on them. In actual fact, order in terms on 19 May 1998 had already been granted in the absence of the defendants in OS 24-492-1998(1) for the decision of the present case to bind them. The defendants' in OS 24-492-1998(1) quickly applied for a stay and to set aside the order of this court dated 19 May 1998 as seen in encl. 12 which was fixed for hearing on 9 October 1998. On that date after hearing submissions from the counsels, this court dismissed the defendants' application in encl. 12 prayers (b), (c), (d) and (e) with costs. The defendants must have been contented with the decision of this court for they did not lodge an appeal against it.

On 25 February 1999, the court convened to hear arguments in relation to OS 24-486-1998(1) where the defendants were Orang-orang yang menduduki rumah yang ditanda sebagai "A5" dan didirikan atas sebahagian tanah yang dipegang di bawah hakmilik CT 2733 Lot 2103, Mukim Plentong, Daerah Johor Bahru, Negeri Johor. On that date, the parties agreed that the decision of the present case would bind OS 24-486-1998(1) and an order in terms were recorded on 5 April 1999.

To sum up and by way of a summary, the following seven cases are bound by the decision in the present case:

(a) OS 24-275-1998(1).

(b) OS 24-276-1998(1).

(c) OS 24-277-1998(1).

(d) OS 24-279-1998(1).

(e) OS 24-278-1998(1).

(f) OS 24-488-1998(1).

(g) OS 24-486-1998(1).

For originating summonses referred to in items (a) to (f) of the above, the orders for vacant possessions were recorded on 17 March 1999. In regard to the originating summons referred to in item (g) of the above, an order for vacant possession was recorded on 5 April 1999.

The plaintiff's application under this originating summons can be seen in encl. 3 and it was, *inter alia*, for vacant possession of the house marked as "C31" erected on a portion of the land held under CT 2733 Lot 2103 Mukim Plentong, district of Johor Bahru, State of Johore ("property"). The property had an acreage of 53 acres 3 roods 20 poles. Enclosure 3 too contained a prayer that the defendants to vacate the house from the said property within 14 days from the date of the order pursuant to the application in this originating summons. The plaintiff too prayed for costs of this application and other incidental costs to be borne by the defendnts. Finally, the plaintiff prayed for other reliefs which this court deemed fit and suitable. In perfect Bahasa Malaysia those prayers, in encl. 3 as alluded to and translated by me, must now be reproduced to please all the parties thereto:

(a) Plaintif diberi milikan kosong rumah ("Rumah tersebut") yang didirikan atas sebahagian tanah yang dipegang di bawah hakmilik CT 2733 Lot 2103, Mukim Plentong, Daerah Johor Bahru, Negeri Johor, yang ditandakan sebagai "C31" pada pelan tanah dan yang gambarnya di lampirkan dan masing-masing ditanda sebagai "A" dan "B";

(b) Defendan-defendan dikehendaki mengosong-kan Rumah tersebut dalam masa 14 hari dari tarikh perintah yang dipohon dalam permohonan ini diberi oleh Mahkamah yang mulia ini;

(c) kos bagi permohonan ini dan kos sampingan baginya dibayar oleh Defendan-defendan; dan

(d) relief selanjutnya yang difikirkan adil dan suaimanfaat oleh Mahkamah ini.

The relevant affidavits in regard to encl. 3 were as follows. Enclosure 3 was supported by an affidavit of the plaintiff in encl. 2. Enclosure 10 was an affidavit in reply by the defendants and it replied to encl. 2. Enclosure 12 was the second affidavit of the plaintiff and it replied to encl. 10. Enclosure 16 was the additional affidavit of the defendants and it replied to encl. 12. Finally, encl. 17 was the third affidavit of the plaintiff and it replied to encl. 16.

An Assessment Of The Facts

The plaintiff is the registered owner of the property in question and the transfer in favour of the plaintiff was registered on 15 August 1992 as reflected in the issue document of title annexed to encl. 2 and exhibited as "WCT-1". The plaintiff's stand all along was quite simple – it was the defendants who were the trespassers on the said property and who were occupying the premises without the prior consent and or approval of the plaintiff. The plaintiff, without furtherado, had by its solicitors' letter dated 17 February 1998 demanded from the defendants vacant possession of the premises as reflected in the demand letter annexed to encl. 2 and marked as exh. "WCT-4". Unfortunately the defendants played possum and till to date the defendants have failed, refused and/or neglected to vacate the premises in question.

The defendants vehemently contested encl. 3 and they alleged that:

(1) the defendants' parents (it should be the first defendant's parents) were the ex-employees of Permas Estate which was owned by the National Land Finance Co-operative Society Limited ("co-op"); and

(2) the property in question was part and parcel of the Permas Estate in the later part of the seventies.

The defendants, going on an uphill task, further alleged that:

(1) with the consent of the co-op, the first defendant's parents cleared the jungle to cultivate vegetables under the green book scheme; and

(2) initially, it was said that the occupiers were only cultivating the land on the property but, subsequently, with the blessing of the co-op the occupiers became bolder and built houses and continued to occupy the property in question.

To strengthen these allegations, the defendants called in aid and relied upon a letter dated 24 March 1981 issued by the secretary-general of the co-op. That letter was written in the Tamil language and the translation by the court interpreter was annexed to encl. 10 as exh. "P-1" and it was worded thus:

KOPERASI KEBANGSAAN PEMODALAN TANAH BHD. NATIONAL LAND FINANCE CO-OPERATIVE SOCIETY LTD.

24.3.1981

En. K. Govindasamy,
Ladang Permas,
Pelentong,
Johor.

Tuan Yang Berbahagia,

No. Ahli 18235

Geran 3338 Lot 1088
G.T. 2733 Lot 2103 Mukim Pelentong
EMR 458 Lot 388
G.T. 2733 Pelentong Johor

Selamat sejahtera.

Surat tuan telah diterima oleh kami.

Yang Mulia Tun Sambanthan yang mengizinkan kamu sekelian menduduki tanah itu adalah benar.

Saya difahamkan bahawa tempat itu dinamakan sebagai Kampung Tun Sambanthan. Kamu semua tidak perlu bimbang. Kamu semua mesti akan dapat tanah itu.

Dalam tempoh beberapa hari nanti kami akan datang berjumpa dengan kamu sekelian dan menyempurnakan semua kehendak kamu.

Dengan Perintah

Ahli-Ahli Lembaga Pengarah,

t.t.
K.R. SOMASUNDARAM
AMN, JP
(Setiausaha)

The tenor of that letter indicated that the late Tun Sambanthan authorised the occupation of the property by the occupiers. The first defendant – the son of an ex-employee of the Permas estate, had claimed to have expended money in clearing the jungle and developing the plot of land marked as "C31" in the layout plan (exh. "WCT-2" of encl. 2) and had built a house painted purple on that plot of land at the cost of RM30,000 as seen in the colour photograph marked as exh. "WCT-3" of encl. 2. The issue document of title in exh. "WCT-1" of encl. 2 showed the previous registered owners of the property. The first registered owner of the property was the Bradwall (F.M.S.) Rubber Estates Limited who then transferred and registered the property on 13 December 1965 to the co-op. On 22 March 1983, the property was then transferred and registered in the name of Nalmas Development Sdn Bhd. Finally, on 15 August 1992, the property was transferred and registered in the name of the plaintiff.

I have perused through all the affidavits and approached the whole matter objectively. Sad to say the defendants have failed to produce any evidence or proof of the following matters:

(i) that the first defendant's parents were the ex-employees of Permas estate;

(ii) that the property formed part of the Permas estate;

(iii) that Permas estate was not a proper estate in the fullest sense of the word but rather a jungle and that the first defendant's parents did in fact clear the jungle for cultivation of vegetables under the green book scheme; and

(iv) that there was any representation or encouragement by the co-op to induce either the first defendant's parents or the first defendant to spend money in clearing the jungle, and developing the plot of land marked as "C31" in the layout plan as seen in exh. "WCT-2" of encl. 2 by building the house therein.

It cannot be denied that all the allegations contained in the defendants' affidavits can easily be termed as bare and unsubstantiated allegations. Section 103 of the Evidence Act 1950 enacts as follows:

> 103. Burden of proof as to particular fact.
>
> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> **ILLUSTRATIONS**
>
> (a) A. prosecutes B. for theft and wishes the court to believe that B. admitted the theft to C. A. must prove the admission.
>
> (b) B. wishes the court to believe that at the time in question he was elsewhere. He must prove it.

and the burden of proof clearly falls on the defendants to discharge. Miss Goh Mey Foon, learned counsel for the plaintiff, strenously argued that the defendants have failed to discharge the burden of proof as no evidence whatsoever was produced to prove the defendants' allegations. It is interesting to note that the defendants advanced two inconsistent versions as to how the defendants derived the alleged interest in respect of that plot of land marked as "C31" in the layout plan. The first version was the alleged right given to the first defendant's parents as the ex-employees of the green book scheme. The second version was the so-called consent to occupy the property granted by the co-op to the occupiers of the property by virtue of the letter dated 24 March 1981 as reproduced in the early part of this judgment. The affidavit in

encl. 16 para. 12 contradicted the affidavit in paras. 5 and 6 of encl. 10. In para. 12 of encl. 16, the defendants averred that the house was built by the first defendant in 1978 with the consent of the co-op whereas in paras. 5 and 6 of encl. 10, the defendants alleged that the consent to occupy was given by the co-op pursuant to the co-op's letter dated 24 March 1981. Indeed if the consent to occupy as extended by the co-op took place on 24 March 1981, why was the house built in 1978? – some three years earlier.

I will now proceed to examine the submissions of Miss Goh Mey Foon and Mr. E.M. Yohevel not in its order of priority.

Uncertainty

Section 30 of the Contracts Act 1950 enacts as follows:

> Agreements, the meaning of which is not certain or capable of being made certain, are void.

and under it, the terms of the agreement must be certain. An uncertain or a vague agreement cannot amount to a binding contract. The House of Lords in *G. Scammell & Nephew Ltd v. Ouston* [1941] AC 251 held that an agreement to acquire goods "on hire purchase" was too vague as it was impossible to specify the terms on which the parties had agreed. Vague agreements have existed in the following situations:

(1) where a house was purchased "subject to satisfactory mortgage" (*Lee-Parker v. Izett* [1972] 1 WLR 775);

(2) where a boat was sold "subject to satisfactory survey" (*Astra Trust v. Adams & Williams* [1969] 1 Lloyd's Rep. 81); and

(3) where an offer of employment was made "subject to satisfactory references" (*Wishart v. National Association of Citizen's Advice Bureaux* [1990] 1 CR 794).

In construing the letter dated 24 March 1981 as reproduced earlier, I am mindful of the speech of Lord Wright in *Hillas & Co. Ltd v. Arcos Ltd* [1932] 147 LT 503, 514, and this was what his Lordship said:

> Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat*. That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as they are appropriate implications of law.

Here there was no proof whatsoever from the defendants to show:

(1) the size of the land area that was intended to be given to the first defendant's parents or the defendants whether under the green book scheme or by the co-op;

(2) the exact location of the portion of the land that was intended to be given to the first defendant's parents or the defendants;

(3) the existence of any consideration and how that consideration was to be fulfilled bearing in mind that consideration must be "of some value in the eye of the law" (*Thomas v. Thomas* [1842] 2 QB 851, 859); and

(4) the method wherein the plot of land marked as "C31" in the layout plan was to be transferred or conveyed to the defendants.

Even the alleged interests of the defendants on that plot of land were uncertain and, consequently, void. To date, none of the defendants has taken positive steps to enforce their alleged interests over the plot of land marked as "C31" in the layout plan. Not a single caveat was lodged on the property to give notice to the world at large of the defendants' alleged interests on the property. It must be borne in mind that under s. 323 (1)(a) of the National Land Code, 1965 ("NLC"), a private caveat can be entered, *inter alia*, by "any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest." The lodging of a caveat is the best method to obtain priority under the Torrens system. But the caveat does not give notice of an interest, rather it gives notice of a claim to an interest which if challenged must be examined by a court of competent jurisdiction. The caveat does not act to validate the caveator's interest but merely freezes the register so as to enable the caveator to pursue his claim to be entitled to register. But alas the defendants failed to take advantage of the caveat provisions in the NLC.

A Revocable Licence And Not An Interest In Land

Even assuming that the property was part and parcel of the green book scheme and the allegation that the first defendant's parents were the ex-employees of Permas estate was true, from the available evidence no interest in land has been created by the co-op in favour of the first defendants' parents nor the defendants themselves.

Paragraph 9 of encl. 16 contained a damning assertion. In that paragraph, the defendants had admitted that consent was given to the ex-employees to cultivate vegetables and not to occupy the property nor was there any promise that the property will be transferred to such ex-employees in due course. For brevity, para. 9 of encl. 16 was worded thus:

9. Pada tahun 70' an atas polisi 'buku hijau' pengurus ladang-ladang telah memberi tanah-tanah kosong bagi pekerja-pekerja supaya mereka dapat menanam sayur-sayuran untuk menampung pendapatannya. Selaras dengan polisi ini Pengurus Ladang Permas telah di beri tanah-tanah yang tidak di usahakan kepada pekerja-pekerjanya dan ibubapa saya juga telah memberi (diberi) kebenaran untuk mengusahakan kawasan tanah lapang disitu.

and clearly therefore no interest in land was ever created. At best only a revocable licence to cultivate the property was granted to the ex-employees of Permas estate strictly for the purpose of planting vegetables. But, such a licence was revoked when the co-op, on 22 March 1983, transferred the property and registered it in the name of Nalmas Development Sdn Bhd. An argument was advanced that the co-op's sister company was none other than Nalmas Development Sdn Bhd, but it must be emphasised that they were separate legal entities. Moreever there was no evidence whatsoever to show that the co-op and Nalmas Development Sdn Bhd were sister companies. A revocable licence has been aptly described in *Clerk & Lindsell On Torts*, sixteenth edition, at p. 1334 as follows:

> At common law a revocable licence was revoked where the licensor conveyed the land to another, so that the licensee became a trespasser if he remained on the land or entered on it after the conveyance (*Wallis v. Harrison* [1838] 4 M. & W. 538). This was so at common law even if the licensor's purchaser bought with express notice (*King v. David Allen & Sons* [1916] 2 AC 54). And the Court of Appeal in *Clore v. Theatrical Properties Ltd.* [1936] 3 All ER 483 declined to recognise a valid equity against the purchaser with notice so as to bind him at the suit of the licensee.

At this juncture, reference to the case of *Toh Kheng Heng & Anor v. Ahmad Fauzi bin Mohd Taufek* [1994] 1 MLJ 356 would be ideal. The facts in that case may be stated as follows. The plaintiffs there were the registered owners of a piece of land which they claimed that they had bought it from the previous owner with vacant possession. The plaintiffs later entered into a sale and purchase agreement to sell the land and subsequently visited the land and discovered that the defendant and others were in occupation of it. The plaintiffs then issued a notice to quit on the defendant requiring him to give up vacant possession or to vacate the house he was occupying within two months from the date of notice. Despite the notice to quit, the defendant failed to give up possession of the land. The plaintiffs therefore filed an application under O. 89 of the RHC for an order that they be given possession of the land. The plaintiffs claimed that the defendant and the others were in occupation of the land without their consent, licence or agreement and also without the consent of the authorities and the plaintiffs claimed that the occupation of the land was unlawful. The defendant filed an affidavit in reply stating that it was

not possible that the plaintiffs had bought the land from the previous owners with vacant possession. The defendant also claimed that the notice to quit served upon him was not valid under the law as he had an equitable right to occupy the land. In allowing the plaintiffs' application the court held, *inter alia*, that the defendant himself did not seek to confer or claim any higher status as to his occupation of the land than as a licensee. He was therefore a gratuitous licensee and in that capacity, his licence to occupy the land was properly terminated when the notice to quit was served on him. Thereafter, so the court held, that the defendant became a trespasser on the land and the plaintiffs were entitled to apply under O. 89 of the RHC for the defendant to be evicted. At p. 366 of the report, the learned Judicial Commissioner had this to say:

> Even if the defendant was allowed to occupy the land by the plaintiffs' predecessors-in-title and subsequently by the plaintiffs themselves, the defendant was only a gratuitous licensee and the consent of the plaintiffs' predecessors-in-title or that of the plaintiffs to his occupation of the land did not have the effect of conferring upon him any rights in equity. He was a sojourner on the land at the will of the plaintiffs' predecessors-in-title and subsequently at the will of the plaintiffs. Upon the issue of the notice to quit on 24 November 1992 and its crystallization two months later, the defendant ceased having any right to remain on the land, his licence to occupy the land having been lawfully terminated upon the expiry of the notice to quit.

The licence to cultivate the property that was given to the first defendant's parents must have been determined upon the death of the first defendant's parents as that licence to cultivate was personal to the ex-employees of Permas estate and did not run correspondingly with the property and was not capable of being passed down to their children. Death brought an end to the licence to cultivate the property. Just like the case of *Verama v. Amarugam & Anor* [1982] 1 MLJ 107 where the licence granted to the husband of the first defendant died with her husband, the present case was not an exception. On the doctrine of equitable estoppel, Arulanandom J in *Verama's* case at p. 108 had this to say:

> The defendants claimed that the doctrine of equitable estoppel applied and reliance was placed on Lord Denning's comments in the case of *Inwards & Ors v. Baker* [1965] 1 All ER 446 cited in the case of *Ooi Ai Seng v. Chan Lin Lam* [1973] 2 MLJ 20 & 21 where Lord Denning states:
>
> > ... in this case, even though there is no binding contract to grant any particular interests to the licensee, nevertheless the court can look at the circumstances and see whether there is an equity arising out of the expenditure of money. All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent

> the money in the expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated where it would be inequitable so to do. In this case it is quite plain that the father allowed an expectation to be created in the son's mind that the bungalow was to be his home. It was to be his home for his life or, at all events, his home as long as he wished it to remain his home. It seems to me, in the light of that equity, that the father could not in 1932 have turned to his son and said: 'You are to go. It is my land and my house'. Nor could he at any time thereafter so long as the son wanted it as his home.
>
> But one must always realise that in interpreting land laws in this country, one should always bear in mind that land laws are governed by the National Land Code which does not allow the law to be tempered by equity.

In *Toh Heng Kheng's* case *(supra)* too the licence to occupy the land came to an end with the death of the defendant's mother in 1984.

The Co-op's Letter Dated 24 March 1981

As I said the defendants relied on this letter to argue that their occupation of the property had been authorised. It was obvious from the contents of the letter as reproduced earlier that it showed that the co-op's letter was addressed to K. Govindasamy with his membership number expressly stated therein. It was a letter addressed to that individual yet the defendants had the audacity to say that that individual acted as the representative of the occupants of the house on the plot of land marked as "C31" in the layout plan. There was nothing to show that that individual acted in a representative capacity; it was a classic case of a bare allegation and nothing else. The co-op's letter too did not state that K.Govindasamy acted in a representative capacity.

Even if I am prepared to hold that the co-op's letter was addressed to K. Govindasamy as the representative of the occupiers of the property, which clearly was not the case, yet that letter cannot confer any interest in land capable of registration under the NLC. The Privy Council in *Registrar of Titles, Johore v. Temenggong Securities Ltd* [1976] 2 MLJ 44 held, *inter alia,* that interests which the Registrar of Titles was empowered to protect under s. 320(1)(b) of the NLC were confined to interests in the land that were recognised by the Land Code as being either registrable or otherwise entitled to protection. An unsecured creditor of the proprietor of the land had no such interest in the land. Lord Diplock delivering the judgment of the Privy Council at p. 45 of the report had this to say:

> The person in whom is vested land which has been disposed of by the State upon these terms is referred to in the Code as the 'proprietor' of the land and his interest as the 'title' to the land. Under the Code interests in alienated land are divided into two categories: those which are registered and those which

a are not. The only interests capable of being registered are title, leases (including sublease) for a term exceeding three years, charges on the land and easements over the land. Registered title to land can be transferred and other registered interests in land can be created and transferred by registered dealings only. These dealings take effect when a written instrument in the appropriate form provided for by the Code is presented for registration at the Registry. The title b to land or to an interest in the land which is conferred by registration is indefeasible in the absence of fraudulent or similar misconduct on the part of the person in whose name the title or interest is registered; but such misconduct does not defeat the registered title or interest of a *bona fide* purchaser for value from the guilty party or any person claiming through such a purchaser.

c Further down the same page of the same judgment and spilling over to p. 46, his Lordship continued:

Interests in land that are unregistrable fall into three categories *viz*. tenancies for a term of less than three years, liens created by deposit of instruments of title as security for a loan, and beneficial interests under a trust affecting the d land. Where, however, the person registered as proprietor of land holds the title as bare trustee for a beneficiary, the beneficiary may convert his beneficial interest into a registered interest by requiring the registered title to be transferred to him.

e It is interesting to note that s. 205(1) of the NLC enacts that the dealings capable of being effected under the NLC would be with respect to alienated lands and interests therein shall be those specified in Parts Fourteen to Seventeen, and no others. Part Fourteen relates to Transfers. Part Fifteeen relates to Leases And Tenancies. Part Sixteen relates to Charge And Liens. Finally, Part Seventeen relates to Easements. Only those Parts mentioned in f s. 205(1) of the NLC are dealings capable of being effected under the NLC, and no others. That would be the prevailing law. Then there is s. 206 of the NLC which enacts as follows:

206. (1) Subject to the following provisions of this section –

g (a) every dealing under this Act shall be effected by an instrument complying with the requirements of sections 207 to 212; and

(b) no instrument effecting any such dealing shall operate to transfer the title to any alienated land or, as the case may be, to create, transfer or otherwise affect any interest therein, until it has been h registered under Part Eighteen.

While s. 207(1) of the NLC enacts as follows:

207. (1) Every instrument effecting any dealing under this Act shall be in such of the forms in the First Schedule as is specified in relation to the i dealing in question in the appropriate Part of this Division:

> Provided that the form so specified for any dealing may, so long as the variation is not in a matter of substance, be used in any particular case with such adaptations, alterations or additions as may be rendered necessary by the character of the parties or other circumstances of the case.

All these provisions of the NLC when referred to and when applied to the factual matrix of the present case, bring to the forefront an issue of crucial importance. It was this. Whether the co-op's letter dated 24 March 1981 can be construed as an instrument capable of registration under the NLC? The answer would be quite obvious. There was no sale and purchase agreement of the plot of land marked as "C31" in the layout plan as seen in exh. "WCT-2" of encl. 2. There was no lease or tenancy being created by the existence of this letter. The co-op's letter was not a memorandum of transfer of land as envisaged in Form 14A of the NLC nor was it a memorandum of lease of land as reflected in Form 15A of the NLC. There was no endorsement of tenancy on the register document of title nor was there any entry of caveat by the defendants on the property so as to protect the defendants' alleged interests as well as to give notice to the public at large. In the words of Lord Diplock in *Registrar of Titles, Johore v. Temenggong Securities Ltd (supra),* particularly at p. 46 of the report:

> The National Land Code provides means of protecting unregistered interests in land from being overridden by *bona fide* purchasers for value of a registered title or interest. Short term tenancies are protected by endorsing the register document of title to the land with the words: 'Exempt Tenancy Claim.' This preserves the tenancy as against subsequent grantees of the land or of any interest in it. Protection to all other kinds of unregistrable interests is provided by entering a caveat in the register on the document of title to the land. Until it is removed a caveat imposes restrictions on the entry in the register of dealings in the land.

The conclusion would be irresistible. The defendants have no interests on the property capable of registration and being registered under the NLC. The co-op's letter was not an instrument under the NLC that was capable of registration.

Even if I am prepared to hold that the co-op's letter was an intended sale of the plot of land marked as "C31" in the layout plan, the defendants cannot gain mileage from it. As I said, the co-op's letter was incapable of registration. The sale of a part only of an alienated land would run counter to s. 214(1)(a) of the NLC. The total acreage of the property measured 53 acres 3 roods 20 poles (see exh. "WCT-1" of encl. 2). The defendants alleged that the co-op had given its consent to the defendants to occupy the plot of land marked as "C31" in the layout plan and even if this was true, such consent cannot, in

law, amount to an interest in the property as to enable the defendants to transfer that part to them. In *Punca Klasik Sdn Bhd v. Liza James & Ors* [1996] 3 CLJ 932, 945 the court said:

> In a nutshell, section 26A of the Land Enactment No: 1 allows the transfer of the whole portion of an undivided share but bars the transfer of the disputed portion out of the disputed land which was held under and in one title. An equivalent provision is also found in section 214(1)(a) of the National Land Code ("NLC") where the whole, but not a part of the alienated land can be transferred.

In *Punca Klasik Sdn Bhd (No: 2)* [1996] 5 MLJ 92, 112, the court said:

> Reverting back to the issue at hand, it is abundantly clear that the NLC prohibits totally the transfer of a part of any alienated land or a part of an undivided share in that land. Now, even if one were to go to an extreme to say that Lim's father and Ng's father contracted to purchase those parts or portions from Estate and Trust Agencies (1927) Ltd, which is not the case here, that is clearly barred under section 214(1)(a) of the NLC.

And at p. 113 of the same judgment, the court explained the rationale of s. 214(1)(a) of the NLC in these words:

> The rationale for imposing a prohibition to transfer a part of the alienated land stems from quite an obvious reason. As a matter of practice since there is only one title issued in respect of an alienated land whether held by a single proprietor or otherwise, it follows that a transfer of part of that alienated land cannot be effected unless and until separate title has been issued in respect of the part of the land which is sought to be transferred. A separate title can only be issued on such part of the land upon sub-division of the said land.

It bears repetition to repeat the co-op's letter where the pertinent parts read:

> Kamu semua tidak perlu bimbang kamu semua mesti akan dapat tanah itu.
>
> Dalam tempoh beberapa hari nanti kami akan datang berjumpa dengan kamu sekelian dan menyempurnakan semua kehendak kamu.

but alas, nothing positive was done to carry into effect the promise of the co-op. There was no application at all by the co-op to sell, transfer or otherwise dispose of that plot of land marked as "C31" in the layout plan to the defendants nor was there any application for sub-division of the property being submitted to the land office. At any rate, as I said, the co-op's letter was a useless piece of document as it was incapable of registration and under it no interest had been created in the property that would bind the plaintiff. The defendants too, all these years, played possum as they had done absolutely nothing to protect their claims to that plot of land marked as "C31" in the layout plan. The defendants did not commence any legal action to enforce or

to sue for specific performance of their alleged interests which they claimed. Simply put, by specific performance the defendants may compel the defaulting party to perform his part of the bargain under the contract. That would have been the best recourse for the defendants to take. It must however not be forgotten that the discretionary nature of the relief of specific performance as embodied in the Specific Relief Act 1950 should always be borne in mind. Section 21 of the Specific Relief Act 1950 provides that the jurisdiction to decree specific performance is at the discretion of the courts, and the courts are not bound to grant such relief merely because it is lawful to do so. But the discretion must not be exercised arbitrarily but rather it must be based on sound and reasonable grounds, guided always by judicial principles and certainly capable of correction by a court of superior jurisdiction. But alas, the defendants did not seek to sue for specific performance and that would be the end of the matter. At any rate the doctrine of estoppel would be vigorously applied to estop the defendants from claiming the alleged interests.

Statute Barred

The alleged promise of the co-op as reflected in the co-op's letter was dated 24 March 1981. Assuming for the moment that such promise was legally enforceable, the defendants' right to seek specific performance for the transfer of the plot of land marked as "C31" in the layout plan after sub-division thereof, was not only too late in the day but it was already statute barred. Section 9(1) of the Limitation Act 1953 enacts as follows:

> 9. Limitation of actions to recover land.
>
> (1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.

Here the alleged breach, if at all that breach had occurred, must have been on 22 March 1983 when the property was transferred by the co-op to Nalmas Development Sdn Bhd. Calculation wise the limitation period for the recovery of that plot of land marked as "C31" in the layout plan had expired on 22 March 1995.

"Stale demands" should be suppressed so that litigation would come to an end (*Cholmondeley v. Clinton* [1820] 2 J. & W. 1; 4 Bli. 1; *A'Court v. Cross* [1825] 3 Bing. 329, 333; and *R.B. Policies at Lloyd's v. Butler* [1950] 1 KB 76). That would be the policy of the law, and three reasons may be advanced for it:

(1) that defendants should be protected against claims made after a long period of time where the evidence available may be lost to rebut those claims;

(2) the plaintiffs should act promptly and expeditiously and should not sleep on their rights; and

(3) the defendants should be assured that an incident which might have led to a claim against them has finally come to a close.

Applying these basic principles of law to the facts of the present case, the axe of limitation would impede the defendants to enforce their rights against the plaintiff.

Frustration

Section 57(1) of the Contracts Act 1950 enacts that an agreement to do an act impossible in itself is void. Frustration arises when there is a change in the circumstances that renders the contract legally or physically impossible of performance. The House of Lords in the case of *Joseph Constantine Steamship Line Ltd v. Imperial Smelting Corporation Ltd* [1942] AC 154 describes frustration as "only a special case of the discharge of contracts by an impossibility of performance arising after the contract was made." Section 52(2) of the Contracts Act 1950 states the doctrine of frustration in this way:

> A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

What is an "impossibility" is not defined in the Contracts Act 1950. My understanding of s. 57(2) of the Contracts Act 1950 is simply this. It has in mind two instances of frustration, firstly, when a contract to do an act becomes impossible and, secondly, when it is unlawful. Frustration must be an act that happens subsequent to the formation of the contract. But it must be borne in mind that a "self-induced frustration" does not and cannot discharge a party of his contractual obligations: *Maritime National Fish Ltd v. Ocean Trawlers Ltd* [1935] AC 524. Once a contract is discharged by frustration, that contract does not become voidable, rather the contract comes to an end forthwith and automatically (*Hirji Mulji v. Cheong Yue Steamship Co Ltd* [1926] AC 497). Section 57(2) of the Contracts Act 1950 states that the contract once frustrated it "becomes void." At common law, the effect of frustration is to release the parties to the contract of any future obligations but it leaves intact any legal rights already accrued or money paid. Lord Radcliffe speaking for the House of Lords in *Davis Contractors Ltd v. Fareham UDC* [1956] AC 696, 729 sets out the test for frustration in these words:

> ... frustration occurs whenever the law recognizes without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.

This very test was applied in *Khoo Than Sui v. Chan Chiau Hee* [1976] 1 MLJ 25 and *Ramli bin Zakaria & Ors v. Government of Malaysia* [1982] 2 MLJ 257 to reject a defence of frustration. Viscount Simonds in *Tsakiroglou & Co Ltd v. Noblee Thorl G mb H* [1962] AC 93 held that the nature of the contract should be "fundamentally altered" before it can be said that the contract had been altered. In *National Carriers Ltd v. Panalpina (Northern) Ltd* [1981] AC 675, Lord Simon restated the test in the following way (see p. 700 of the report):

> Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance.

Applying these principles to the facts of the present case, whatever agreements that the defendants had with the co-op or even with Nalmas Development Sdn Bhd, those agreements have, in law, been frustrated and have become void since those agreements have become incapable of performance and unlawful once the plaintiff became the registered proprietor of the property (*Punca Klasik Sdn Bhd (No: 2) (supra)* – at p. 116).

Indefeasibility

The property has since been transferred and registered in the name of the plaintiff. In accepting the transfer of the property, the plaintiff holds it subject to "other registered interest" as envisaged in s. 215(3)(a) of the NLC. Once the plaintiff became registered as the proprietor of the property, the title became indefeasible under s. 340 of the NLC and the plaintiff has a title which was free of all adverse claims or encumbrances not noted on the register *(Punca Klasik Sdn Bhd v. Liza James & Ors (supra))*. Lord Diplock in *T. Damodaran v. Choe Kuan Hin* [1979] 2 MLJ 267 PC held that the only exceptions to the principle of indefeasibility would be in situations where there were fraud, misrepresentation, forgery or an *ultra vires* acquisition to have been made under statutory authority.

In my judgment, none of these exceptions apply to the present case. The court in *Majlis Amanah Rakyat (MARA) v. Tam Seek Hong & 54 Ors* [1994] 2 AMR 25: 1296 said at p. 1304:

> Under our Torrens System the register is everything. Upon registration, the party in whose favour the registration has been effected will obtain an indefeasible title to or interest in the land (s. 340(1) of the National Land Code), that is, a title or an interest which is free of all adverse claims or encumbrances not noted on the register. I might as well mention that registration under the National Land Code is effected when a prescribed memorial of the dealing is made on the register document of title under the hand and seal of the registering authority (*Mohammad bin Buyong v. Pemungut Hasil Tanah, Gombak & Ors* [1982] 2 MLJ 53).

and clearly the plaintiff here was entitled to hold the property free from all adverse claims or encumbrances not stated on the register document of title. Since the alleged interest of the defendants was neither endorsed nor registered on the register document of title nor protected by any caveat, the plaintiff was not bound by the said alleged interest as claimed by the defendants.

Raja Azlan Shah CJ Malaya (as His Majesty then was) in *PJTV Denson (M) Sdn Bhd v. Roxy (M) Sdn Bhd* [1980] 2 MLJ 136 aptly said that "the concept of indefeasibility of title is so deeply embedded in our land law that it seems almost trite to restate it." The plenitude of authorities found in the law journals described the word "indefeasibility" in a number of ways. Some described it as "conclusive", "unimpeachable", while others described it as "unexaminable", and "state guaranteed". Perhaps the best description of the word "indefeasibility" comes from the case of *Frazer v. Walker And Others* [1967] 1 All ER 649 at p. 652 where Lord Wilberforce described it as:

> ... a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever; as will be seen later, there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam. These are matters not to be overlooked when a total description of his rights is required; but as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him.

Indefeasibility would be achieved by registering the instrument of dealing in statutory form duly executed, attested and determined by the Registrar. Under the Torrens system, title is obtained not from the execution of the statutory instrument but rather by way of registration. Once the instrument is registered, title would then pass. I will now proceed to examine the facts in *Frazer v. Walker And Others (supra)*. In that case, a husband and wife were registered

proprietors of farm land which was subject to a mortgage. The wife sought to obtain a larger sum by way of a loan so as to discharge the existing mortgage and for this purpose she entered into a new and first mortgage with the second lender. She did not tell the husband about her plan and she conveniently forged his signature on the mortgage. The discharge and the new mortgage were registered. Unfortunately, no interest was paid under the loan and the mortgagee sold the land to the purchaser who then registered the transfer. The husband later discovered, to his dismay, what had happened and he was unable to set aside the registration because:

> ... registration ... confers upon a registered proprietor a title to the interest in respect of which he is registered which is immune from adverse claims, other than those specifically excepted. In doing so they wish to make clear that this principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim *in personam*, founded in law or in equity, for such relief as a court acting *in personam* may grant.

Equity And Proprietary Estoppel

Equity plays no role at all under our NLC *(Punca Klasik Sdn Bhd (No: 2) (supra))* and that being the case, it was an exercise in futility to rely on equity to assist the defendants.

On proprietary estoppel, the defendants were required to prove three essential elements, namely, assurance, reliance and detriment. In *Beh Lee Liang v. Chew Sah Suak @ Chew Sar San & Anor* [1996] 1 CLJ 173, particularly at p. 174 the headnote reads:

> For equity to intervene there must be evidence of some inducement or encouragement by the plaintiff to the defendant or some expectation held out by the plaintiff to the defendant on the strength of which the defendant expended money. Here there was no representation or encouragement by the plaintiff to the defendant to occupy the two shophouses built on the said land and neither was there encouragement for the defendant to renovate the two shophouses. Lacking these ingredients, the principle of equitable estoppel could not apply to the facts of the present case. When the said land was registered in the name of the plaintiff any dependent interest created by the plaintiff or any interest properly claimed by the defendant against the said land through the plaintiff would come to an end.

In *Hotel Holdings (M) Sdn Bhd v. Chai Him & Ors* [1997] 4 MLJ 601, at pp. 603 to 604 the headnote reads as follows:

> The three elements that must be proved in order to establish a proprietary estoppel were assurance, reliance and detriment. On the alleged equity of the first defendant, the only evidence available was that Lim Low Tiew had allowed him to occupy a portion of Lot 184 and to build a house on it in 1957. He

> had expended money in putting up the house and had planted fruit trees on the portion of lands occupied by him. However, there was no evidence to reach any conclusion that Lim Low Tiew had led the first defendant into the belief or expectation that upon him expending money in building the house he could remain there for as long as he liked or for a considerable length of time. The representation by Lim Low Tiew was not clear and unequivocal. Therefore, the first defendant had failed to establish that he had an equity over the portion of lands occupied by him.

In *Toh Kheng Heng & Anor v. Ahmad Fauzi bin Mohd Taufek (supra)*, where at p. 362 of the report the court said:

> Principles of equity are not provided for under the National Land Code 1965, and for equity to intervene there must be evidence of some inducement or encouragement by the landlord or expectation held out to the tenant on the strength of which he had expended money on the land. Such evidence was absent here. The defendant had never been a tenant of the predecessors-in-title to the plaintiffs and he could not claim any tenancy. Neither was he a tenant nor a licensee of the plaintiffs. No inducement had been held out to him for him to claim to be protected by equity.

Using these principles of law as guidelines and applying them to the facts of the present case, the defendants had not in their affidavits claimed that they or the first defendant's parents were the tenant or the lessee of the co-op or Nalmas Development Sdn Bhd. That being the case, there was thus no landlord-tenant or lessor-lessee relationship. The defendants too did not raise the issue of contractual licence for this court to adjudicate upon. There was also no issue of the sale and purchase of the plot of land marked as "C31" in the layout plan to the defendants at all. The defendants too failed miserably to establish the three requisites for the creation of a proprietary estoppel, namely, assurance, reliance and detriment – in that order. Other than the mere allegations by the defendants and the co-op's letter dated 24 March 1981 which said that "dalam tempoh beberapa hari nanti kami akan datang berjumpa dengan kamu sekelian dan menyempurnakan semua kehendak kamu", there was no evidence at all to show that the defendants had been induced or encouraged or given the expectation which prompted the defendants to expend money to build the house. Evidence wise, there was no representation or encouragement by the plaintiff or its predecessors-in-title to encourage the defendants to demolish the old house and to spend RM30,000 to erect a new house in 1988. The deponent in the additional affidavit in encl. 16 at para. 13 merely deposed that he had spent approximate RM30,000 on that plot of land marked as "C31" in the layout plan. But alas, the defendants acquired no equity by that expenditure since they knew fully well that the property had been transferred and registered to Nalmas Development Sdn Bhd on 22 March 1983.

Incidentally, two "surat akuans" from the kampung heads marked as exh. "P1" of encl. 16 which showed that Poongavanam a/l Vadivelu had stayed at No: 9, Jalan Tun Sambanthan for almost 19 years were of no assistance at all to the defendants. These two "surat akuans" were worded thus:

SURAT AKUAN

Saya KETUA KAMPUNG (YAHYA BIN SHAHDAN) KAWASAN SENIBONG MUKIM PLENTONG dengan sesungguh dan sebenarnya mengaku bahawa

> EN. POONGAVANAM A/L VADIVELU K/P NO: 550305-08-5647 (8307278) NO. 9, Jalan Tun Sambantan 11, Plentong Johor Bahru dengan ini perakui bahawa ianya telah bermustatin di kampung atau di alamat tersebut bermula pada tahun 1979 hampir 19 tahun.

Sekian untuk makluman.

Sgd (Illegible)
(YAHYA BIN SHAHDAN, PIS)
KETUA KAMPUNG
KAWASAN SENIBONG
MUKIM PLENTONG

SURAT AKUAN

Saya Penghulu Mukim Plentong (Zanurian bin Ahmad) dengan sesungguh dan sebenarnya mengaku bahawa

> Encik Poongavanam a/l Vadivelu K/P No: 8307278 (KPT No. 550305-08-5647) di alamat No. 9, Jalan Tun Sambantan 11, Plentong, 81750 Masai, Johor dengan ini memperakui bahawa beliau telah bermustatin di alamat yang tersebut dan kampung yang dinyatakan sejak tahun 1979 iaitu hampir 19 tahun.

Sekian untuk makluman.

Sgd (Illegible)
ZANURIAN BIN AHMAD
PENGHULU MUKIM PLENTONG
JOHOR BAHRU

These two "surat akuans" cannot confer any interests on the plot of land marked as "C31" in the layout plan which were capable of registrations under the NLC. On the facts, the irresistible conclusions would be:

(1) that the defendants having failed to plead and establish the alleged equity, they cannot call equity to their assistance to assist them in their grievances;

(2) that since equity has no role to play in our NLC, the defendants' position would be greatly weakened;

(3) that the defendants were not the tenants, the lessees, the licensees or the purchasers of the plot of land marked as "C31" in the layout plan currently occupied by the defendants; and

(4) that the defendants must, in the circumstances, be termed as trespassers of the property in the eyes of the law.

Trespassers

I will now proceed to refer to some authorities on the meaning of this word. Of significance to note would be the case of *Punca Klasik Sdn Bhd v. Liza James & Ors* (*supra* – at p. 944) where the court remarked:

> In plain language, it means that where an entry is legal, its continued occupation may be tainted and the present owner may proceed by way of an originating summons to oust the trespasser. This order, for fear of repetition, will not apply to tenants holding over the land after the termination of tenancy or tenancy or licence granted by any predecessor in title. All the authorities show a similar trend and that trend is this – a person who enters upon another's land and remains thereto to the detriment of the owner is a trespasser pure and simple (see as an example *Hotel Ambassador (M) Sdn. Bhd. v. Seapower (M) Sdn. Bhd.* [1991] 1 MLJ 221). Idris Yusoff J in *Esso Malaysia Bhd v. Hills Agency (M) Sdn. Bhd. & Ors.* [1994] 1 MLJ 740 aptly paraphrases the law in these words:
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> > The law is settled that the summary proceedings for possession of land can be employed in a situation where a person entitled to possession of the land claims possession of such land occupied by another person without his licence or consent or the licence or consent of any of his predecessor-in-title or in another situation where a person who has entered into occupation of the land with the licence or consent of the person entitled to possession of the land or any of his predecessor-in-title but remains in such occupation without licence or consent of the person entitled to possession or any predecessor-in-title of his.

Next, it would be the case of *Punca Klasik Sdn Bhd (No: 2)* (*supra* – at p. 118 to p. 119 of the report) where the court referred to *Segar Restu (M) Sdn Bhd v. Wong Kai Chuan* [1994] 4 CLJ 757; [1994] 3 MLJ 530 and explained who is a trespasser. In summary that case decided that a trespasser "is one who wrongfully enters on land in the possession of another, and has neither right nor permission to be on the land."

It must be borne in mind that squatters have no right either in law or equity to remain on the land (*Sidek bin Haji Muhamad & 461 Ors v. The Government of the State of Perak & Ors* [1982] 1 MLJ 313 FC). In *Punca Klasik Sdn Bhd v. Foh Chong & Sons Sdn Bhd & Ors* [1998] 1 CLJ 601, 622 the court said that "squatters have no legal standing in law or in equity and they can

be ousted at will". In the context of a trespasser, one must always bear in mind the owner's right to immediate possession. By "owner", I meant the registered owner and this must necessarily be the present plaintiff. In *Portland Managements Ltd v. Harte and Others* [1976] 1 ALL ER 225 CA, Scarman LJ delivering the main judgment of the Court of Appeal said at p. 229:

> Possession is, of course, a very important matter to be considered in the action of ejectment, or the action for trespass. But the law is perfectly clear. If a stranger to the title is seeking, by reliance on some lesser or derivative interest, to obtain possession from someone who is in possession, then the defendant can rely on his possession to defeat that sort of claim. But if the absolute owner is suing, and if the absolute owner has shown by his conduct an intention to recover possession, then it is not enough for the defendant merely to assert or give evidence that he is in possession; he has got to show that he is there on the basis of some title which is consistent with the ownership of the premises being vested in the plaintiff.

At p. 230 of the same judgment, his Lordship Scarman LJ continued:

> The position as between an owner and another in possession of the land of the owner has been considered in fairly recent times by the Court of Appeal in *Delaney v. T P Smith Ltd* [1946] 2 ALL ER 23, [1946] KB 393. I need not refer to the facts of that case, but there are two passages from the judgments which indicate the law as I understand it to be. Tucker LJ said:
>
> > It is clear that the plaintiff was in fact founding his claim on the tenancy agreement pleaded by him. It is no doubt true that a plaintiff in an action of trespass to land need only in the first instance allege possession. This is sufficient to support his action against a wrongdoer, but is not sufficient as against the lawful owner, and in an action against the freeholder the plaintiff must at some stage of the pleadings set up a title derived from the defendant ... It is sufficient, I think, to refer to the judgment of PATTESON. J., in *Ryan v. Clark* [1849] 14 QB 65 at 71, where he explained the nature of this plea as follows: '... it admits such a possession as would maintain the action against a wrongdoer, but asserts a freehold in the defendant with a right to the immediate possession'.
>
> Wynn-Parry J took the same view. He said:
>
> > So where a plaintiff by his reply admits the title of the defendant, but pleads a demise from him, there is a true confession and avoidance. The plaintiff is concluded by his confession and must fail in his action unless he proves the case set up by his reply, namely, a demise from the defendants.

> Now, it is true that the parties are the other way round in the present case; but the principle of the law is plain. If the case of the person in possession is, or has to be, that the other side is the owner and that his title derives from a tenancy which the other side has to recognise, then this confession and avoidance, and the burden of proof is on the party setting up the tenancy.

Scarman LJ finally said at p. 231 of the report:

> I cite those cases in support of the proposition, which appears to me to be clear law, that when an owner of land is making a case of trespass against a person alleged to be in possession, all that the owner has to prove is his title and an intention to regain possession. If the defendant to the action either admits his ownership or is faced with evidence, which the court accepts, that the plaintiff is in fact the owner, then the burden is on the defendant to confess and avoid; that is to say, to set up a title or right to possession consistent with the fact of ownership vested in the plaintiff.

Their Lordships Bridge and Megaw LJJ agreed with the decision of Scarman LJ.

It is pertinent to note that K.C. Vohrah J in *Chuan Seng Sdn Bhd v. Ooi Boon Lai & 2 Ors* [1993] 3 CLJ 153 vigorously applied *Portland's* case to the factual matrix of that case. In the present case, what was indisputable was this. That the plaintiff is currently the registered proprietor of the property. That the plaintiff by demanding from the defendants vacant possession of the plot of land marked as "C31" in the layout plan through its solicitors had clearly and unequivocally evinced its intention to regain possession of that plot of land that form part and parcel of the property. According to the authorities, once the plaintiff has proved its title and an intention to regain possession, it was for the defendants to prove that the defendants can set out a title or a right to possession consistent with the plaintiff's ownership. The burden would be on the defendants to show that they had the right to occupy that plot of land marked as "C31" in the layout plan on the balance of probabilities and the defendants miserably failed to do so. Pure and simple this was a case of ejectment or what is popularly known as an action for trespass.

No Adverse Possession

An argument was advanced that the defendants had been in occupation of the plot of land marked as "C31" in the layout plan for more than 20 years. That occupation was more in the nature of an adverse possession and, under the law, regardless of the time span an adverse possession can never give the defendants the right to occupy that plot of land (*Kabra Holdings Sdn Bhd v. Ahmad bin Shahlan & 64 Ors & Or. Persons Unknown* [1992] 2 CLJ 817). The first defendant in *Hotel Holdings (M) Sdn Bhd v. Chai Him & Ors* [1997] 4 MLJ 601, had been in occupation on his portion of the land for an

uninterrupted period of about 40 years and the court rightly held that it was not sufficient to found an equity in his favour. In *Immetec Sdn Bhd v. Yong Tai Hoong & Anor* [1995] 1 MLJ 390, the defendants' counsel submitted that:

(a) the defendants and their families have been staying and occupying the premises for the last 40 years;

(b) the defendants have occupied the land with the permission and/or consent or full knowledge of the previous owner;

(c) the plaintiff only became the owner sometime in 1987;

(d) the plaintiff was aware of all the occupiers of the premises;

(e) all those years, the defendants and their families have improved the land and renovated the said house.

and the court rejected these arguments and held that the plaintiff had established its proprietary right to the land as the registered owner whereas the defendants had not established any right either in law or in equity to remain there except as mere squatters or trespassers. Further, their right to remain on the land as gratuitous licensees was terminated when they received the notices to quit since a gratuitous licence can be revoked at will.

In my judgment, the fact that the defendants have been in occupation of that plot of land marked as "C31" in the layout plan for the last 20 years would be irrelevant and immaterial as it did not confer any interests on the defendants nor did it improve the defendants' interests on that portion of land as claimed by the defendants. In short, an alienated land cannot be obtained by adverse possession under the NLC.

The defendants relied on the two "surat akuans" alluded to earlier to establish the fact that the first defendant had been in occupation for the past 19 years since 1979. But sad to say the two "surat akuans" were not admissible for the following reasons:

(1) the "surat akuans" cannot be considered to be sworn statements, at best it was a mere certification by two unknown persons who did not even affirm affidavits to support the defendants;

(2) there was no evidence to prove that the property was within kawasan Senibong, the area where Yahya bin Shahdan was said to be the ketua kampung;

(3) there was also no evidence to show that the two persons who actually signed the "surat akuans" were the ketua kampung and the penghulu respectively; and

(4) assuming that Yahya bin Shahdan and Zanurian bin Ahmad were the respective ketua kampung for kawasan Senibong and penghulu for Mukim Plentong at the material time, there was no evidence to prove that both of them had been the ketua kampung or penghulu respectively for the last 19 years. Bereft of such evidence both Yahya bin Shahdan and Zanurian bin Ahmad had no personal knowledge to make that kind of certification.

In short, the two "surat akuans" can be dismissed as being hearsay. In *Myers v. DPP* [1965] AC 1001 at 1019, [1964] 2 All ER 881 at 884, Lord Reid aptly said that it is "difficult to make any general statement about the law of hearsay which is entirely accurate." On the authority of *Chandrasekera (alias Alisandiri) v. R* [1936] AC 220, [1936] 3 All ER 865 the hearsay rule is said to apply to all kinds of assertions, whether made orally, in writing or by conduct. Murray-Aynsley CJ in *Lim Ah Oh and Anor v. R* [1950] MLJ 269, 270 (CA) remarked that:

> The rule against hearsay is found in section 60 of the Evidence Ordinance. On this matter I think that the rule is the same as in England and that under that section evidence of statements might be admitted provided always that the reason of admitting was borne in mind, and carefully explained to the jury, if there was one.

Sarkar, Laws of Evidence, 13th edn, p. 51 states as follows:

> An erroneous omission to object to evidence not admissible or relevant under the Act does not make it admissible. It is the duty of the court to exclude all irrelevant or inadmissible evidence even if no objection is taken to its admissibility by the parties.

Here there was an objection advanced by Miss Goh Mey Foon in regard to the admissibility of the two "surat akuans" as being hearsay. I must therefore consider and I have considered that the two "surat akuans" were hearsay and inadmissible. Any assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact or opinion asserted.

Purchase Without Vacant Possession

Mr. E.M. Yohevel for the defendants argued that the plaintiff purchased the property from Nalmas Development Sdn Bhd without vacant possession and, consequently, the plaintiff must recognise the defendants' occupation of the plot of land marked as "C31" in the layout plan. Miss Goh Mey Foon for the plaintiff argued that the fact that the plaintiff agreed to purchase the property inclusive of that plot of land without vacant possession was irrelevant as the plaintiff's application was grounded on O. 89 of the Rules of the High Court 1980 ("RHC") which would entirely side step strangers to the sale and

purchase agreement entered between Nalmas Development Sdn Bhd with the plaintiff. Indeed strangers to the contract are not entitled to enjoy any benefit conferred thereunder. Put in another way, a contract cannot confer rights or impose obligations to any person except the parties thereto. In *Kepong Prospecting Ltd v. Schmidt* [1968] AC 810, a third party made a claim to enforce a contract. In rejecting the claim, the Privy Council said at p. 826:

> It is true that section 2(d) of the Contracts Ordinance gives a wider definition of 'consideration' than that which applies in England particularly in that it enables consideration to move from another person than the promisee, but the appellant was unable to show how this affected the law as to enforcement of contracts by third parties.

Thus, it can readily be appreciated that only the parties to a contract should be allowed to sue under the contract. In *Punca Klasik Sdn Bhd v. Foh Chong & Sons Sdn Bhd & Ors* [1998] 1 CLJ 601, the defendants there alleged that:

(1) the plaintiff purchased the land concerned on an "AS IS" basis without vacant possession and subject to all the existing occupiers, squatters, tenants and/or claimants; and

(2) the plaintiff paid a lesser price for purchasing the land concerned taking into account that the same was purchased without vacant possession and subject to all the rights and interests attached therein.

and the court held that a contract which purports to confer a benefit on a stranger to the contract cannot be enforced by that stranger. The court too held that only parties to a contract can enjoy the benefits of that contract, or suffer the burdens of it.

Of crucial importance to note would be this. The fact that the plaintiff had not taken an immediate action against the defendants cannot be construed adversely against the plaintiff. The delay on the part of the plaintiff to file encl. 3 for vacant possession cannot be construed to mean that the plaintiff had consented to the defendants' occupation of the plot of land marked as "C31" in the layout plan. Adverse possession do not exist in our NLC.

Supplies Of Public Utilities

An argument was advanced that public utilities in the form of water and electricity supplies together with telephone lines were supplied by the government to kampung Tun Sambanthan. A balai raya too had been erected and currently approximately 150 to 200 families are living in that area.

The court in *Punca Klasik Sdn Bhd (No: 2) (supra)* had occasion to adjudicate on the same subject matter. There the court held that payments of quit rents, assessment rates, electricity and water bills cannot be used as barometers to gauge ownership of lands without cogent supportive evidence in that direction. The court too held that the payments of quit rents and assessments can never give the persons who make those payments titles to those parts or portions of the land. Mohd Noor Ahmad J in *Mohd Ali Jahn bin Yusop Sahibjahn & Anor v. Zaleha bt Mat Zin & Anor* [1995] 1 CLJ 533, 537 in the same vein and in apt terms said:

> In my view, the fact that the defendants had paid quit rent on the said land for a number of years does not help them because, as decided in *Yong Yin Siew v. Chong Sheak Thow* [1988] 3 MLJ 115 @ 118 right column paragraph D that the fact of who pays the quit rents for the land does not point to who is the real owner of the land. Further, as trespassers or unlawful occupiers of the said land the defendants acquired no equity by having expanded (expended) money in demolishing the old house and rebuilding new ones on the said land knowing fully well that the plaintiffs' claim was pending before the court.

Not to be outwitted, the defendants relied on the decision of the Court of Appeal in *Salim bin Ismail & 36 Yang Lain v. Lebbey Sdn Bhd* [1997] 2 AMR 1115 which held that the provisions of water supply, roads and a community hall to the settlers in that case together with the consent of the District Officer in allowing the occupants of the land to rebuild their houses after they were destroyed in a fire constituted triable issues and, consequently, an O. 89 of the RHC application was not suitable. His Lordship Ahmad Fairuz bin Sheikh Abdul Halim JCA delivering the judgment of the Court of Appeal had this to say at p. 1123:

> Berteraskan kepada otoriti-otoriti tersebut di atas dan fakta-fakta yang terdapat di dalam affidavit-affidavit perayu-perayu dan responden, nyatalah bahawa perayu-perayu, jika tidak diberi kebenaran oleh Kerajaan Negeri bagi menduduki tanah itu, telah melakukan kesalahan di bawah section 425(1) Kanun Tanah Negara 1965, iaitu kesalahan menduduki secara haram di atas tanah Kerajaan dan perayu-perayu bolehlah didenda tidak melebehi RM10,000 atau dipenjara selama tidak melebihi satu tahun. Walaubagaimanapun, Jabatan-jabatan dan agensi-agensi Kerajaan telah memberi mereka kemudahan-kemudahan seperti air, api, telefon dan sebagainya. Malahan pihak Pegawai Daerah yang sepatutnya melaksanakan undang-undang di bawah Kanun Tanah Negara antara lainnya telah memberi izin kepada perayu-perayu untuk membina semula rumah-rumah mereka yang telah terbakar. Dengan adanya keterangan-keterangan sedemikian rupa, timbullah isu samada tindak-tanduk agensi-agensi Kerajaan itu boleh ditafsirkan sebagai kebenaran Kerajaan Negeri. Ini adalah isu yang boleh dibicarakan. Kerana itu, tatacara di bawah Aturan 89 ini adalah tidak sesuai digunakan oleh responden. Justeru itu, Mahkamah ini telah membenarkan rayuan perayu-perayu dengan kos di sini dan di Mahkamah Tinggi. Mahkamah

ini juga mengarahkan supaya saman pemula itu dijadikan suatu tindakan writ dan semua affidavit-affidavit disifatkan sebagai pliding-pliding dengan kebebasan memohon arahan-arahan selanjutnya daripada Mahkamah bawahan. Deposit diarahkan dibayar kepada pihak perayu-perayu.

It is now opportune to examine at some length *Salim's* case *(supra)*. That case was decided on its special facts and circumstances and it should not be applied mechanically to the present case without analysing and differentiating the peculiarities in that case. In *Salim's* case the land involved was State land and that was the status of the land when the appellants first occupied the land in 1980. Subsequently, the land was transferred to the respondent, a private limited company. The appellants in *Salim's* case claimed that they occupied the land not only with the consent and knowledge of the State Authority but also with their active and concerted encouragement by providing amenities such as electricity, water, asphalt roads, a kindergarten and a surau. The appellants too alleged that after an outbreak of a fire in that area, the District Officer had granted the appellants the relevant approvals to rebuild their houses and a multitude of supports came from the various State authorities to the appellants. Thus, the Court of Appeal based on these peculiar set of facts held that summary application for vacant possession under O. 89 of the RHC was not an appropriate remedy to be used by the respondent.

As I said the land involved in *Salim's* case was a State land at the time when the appellants first entered to occupy. In our presnt case, the property was held and owned by a private proprietor, namely the co-op at the time when the first defendants' parents were allegedly invited to cultivate on the property. It may be argued that water and electricity supplies to the settlers in the *Salim's* case constituted an implied consent of the State Authority in allowing the settlers there to occupy the land but such an argument carried no weight at all and totally irrelevant in the present case as the plaintiff is the private owner of the property and the relevant authorities do not have any power to bind the plaintiff on the issue of the ownership of the land. Only the registered owner of an alienated land, like the present plaintiff, can lease the property to the defendants if so minded. The plaintiff, in so far as the property is concerned, is empowered to grant an interest to the property to any individual. The water and electricity supplies accorded to the defendants cannot confer any equity or interest on the defendants binding on the plaintiff.

Civil Law Act 1956

It was argued quite vigorously that the rules of equity must be brought into play in deciding land matters in our country. References were made to s. 3(1) of the Civil Law Act 1956 and s. 206(3) of the NLC in order to incorporate the rules of equity as administered in England into the land law in our country. But alas the defendants conveniently overlooked the crucial fact that all matters

relating to land law in the country are governed by the NLC. Section 3(1) of the Civil Law Act 1956 is only applicable if there are no written law in force in Malaysia in relation to the subject matter. The legal draftsmen incorporated a device in s. 3(1) of the Civil Law Act 1956 to circumvent wholesale importation of the rules of equity as administered in England by employing these salient words:

> Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall –

It would be of interest to note that the Privy Council in the case of *United Malayan Banking Corporation Bhd & Anor v. Pemungut Hasil Tanah, Kota Tinggi* [1984] 2 MLJ 87 held that s. 3(1) of the Civil Law Act 1956 cannot be relied on by the appellants for the importation of the English rules of equity as the provisions of the NLC was inconsistent with such rules. The Privy Council speaking through Lord Keith of Kinkel at p. 91 aptly said:

> The National Land Code is a complete and comprehensive code of law governing the tenure of land in Malaysia and the incidents of it, as well as other important matters affecting land there, and there is no room for the importation of any rules of English law in that field except in so far as the Code itself may expressly provide for this.

The defendants in rebuttal relied on the speech of Lord Kingsdown in *Ramsden v. Dyson* [1866] LR 1 HL 129 where at p. 170 his Lordship said:

> The rule of law applicable to the case appears to be this: If a man, under a verbal agreement with a landlord for a certain interest in land or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in *Gregory v. Mighell* 18 Ves. 328, and, as I conceive, is open to no doubt ...
>
> If, on the other hand, a tenant being possession of land, and knowing the nature and extent of his interest, lays out money upon it in the hope or expectation of an extended term or as allowance for expenditure, then, if such hope or expectation has not been created or encouraged by the landlord, the tenant has no claim which any court of law or equity can enforce. This was the principal of the decision in *Pillay v. Armitage* 12 Ves. 78, and like the decision in *Gregory v. Mighell*, seems founded on plain rules of reason and justice.

but with respect, the "plain rules of reason and justice" would necessarily be with the side of the plaintiff in the present case as there was no evidence at all to show that the defendants had been induced or encouraged or given the expectation which prompted the defendants to expend money to build that purple house.

Next, the defendants argued that Chang Min Tat J in *Devi v. Francis* [1969] 2 MLJ 169 applied equitable principle to land matters and this court must likewise do so. It is germane to note that the court in *Hotel Holdings (M) Sdn Bhd v. Chai Him & Ors (supra)* watered down the impact of *Devi v. Francis (supra)* when it stated that it must be qualified in the light of indefeasibility of title provided by s. 340 of the NLC subject to the exceptions contained therein and the Torrens system of caveats.

Bereft of the rules of equity, the defendants had nothing to cling on. Vacant possession should be given to the plaintiff forthwith.

Order 89 Of The RHC

The defendants argued that the summary procedure under O. 89 of the RHC should not be invoked in cases where the occupiers occupied the land with the implied or express consent of the current owner or the previous owner. The defendants relied heavily on the decision of the Supreme Court in the case of *Bohari bin Taib & Ors v. Pengarah Tanah Galian Selangor* [1991] 1 MLJ 343 SC. It must be emphasised that *Bohari's* case, was a case involving State land. The Supreme Court in *Bohari's* case held that the appellants have sufficiently shown by affidavit evidence that they have an arguable case in that the appellants have occupied the State land for three years under the temporary occupation licence ("TOL") and thereafter have remained in occupation with the continued consent of the State government. The appellants too in the *Bohari's* case have exhibited the approval letter from the Selangor State Executive Council approving the alienation of the land to the appellants. For these reasons, the Supreme Court held that the case should not be dealt with summarily under O. 89 of the RHC.

Factually, *Bohari's* case are poles apart from the present case. The letter from the co-op cannot be equated to be and can never be an approval from the Johore State Executive Council nor can it be construed to be a TOL like *Bohari's* case. The co-op's letter, being ambiguous and loaded with uncertainties, cannot, in law, confer any interests to the defendants at all.

Order 89 r. 1 of the RHC reads as follows:

> Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order.

and the phrase "persons ... who entered into or remained in occupation without his licence or consent" is important. If a person enters without licence or consent, that person is a trespasser *ab initio*. The phrase "remained in occupation without his licence or consent" envisages the situation of occupation which was lawful at the inception but has subsequently ceased to be so. This is true in the case where the licence, previously given, has been terminated or expired by effluxion of time or upon death. Now, the letter from the co-op gave the first defendant's parents the consent to occupy the property but upon the death of the first defendant's parents that consent expired automatically. There was nothing left for the defendants to hold onto and O. 89 of the RHC was the right remedy for the plaintiff to cling onto. It would be pointless to obtain an order against someone who has entered into occupation of the land and then left it. The present case was a case where the first defendant's parents had entered the property with the consent from the co-op and upon the death of the first defendant's parents, those who remained in occupation did so without the consent of either the co-op or Nalmas Development Sdn Bhd or even the present plaintiff. And those who remained in occupation without licence or consent must be labelled as mere trespassers and nothing else. The defendants failed to show triable issues on affidavit evidence. It would not be sufficient for the defendants to assert that they were in possession, they must proceed to show that they had title or right to possession consistent with the fact of ownership: *Portland's* case *(supra)*.

No Proper Service Of The Originating Summons

The defendants argued that there was no proper service of the originating summons in encl. 3 in that it had not been served in accordance with the provisions of O. 89 r. 4(1) of the RHC. On the contrary this argument was devoid of merit as the affidavits of service in encls. 4, 6 and 7 clearly showed that encl. 3 was served on the defendants. At any rate, it was too late in the day for the defendants to object to the non-compliance with the requirements of O. 89 of the RHC. The defendants had taken the necessary steps to challenge encl. 3 and this meant that there was a waiver of the irregularity. Mohd Noor Ahmad J in *Yap Pun & Anor v. Orang-Orang Yang Tidak Dikenali Yang Menduduki Di atas Tanah Yang Dikenali Sebagai Lot No. 108, Seksyen 92A, Bandar Kuala Lumpur* [1998] 6 MLJ 270 was of the view that the defendants in that case had taken the necessary steps and gave recognition to the proceedings and hence there was a waiver of the irregularity. His Lordship further held that the defendants in that case should have applied earlier to set aside the irregularity under O. 2 r. 2(1) of the RHC before taking steps to defend the action after becoming aware of the irregularity. His Lordship further held that since the defendants in that case were before the court and they had suffered no prejudice on account of the irregularity, the

irregularity was said to be curable under O. 2 r. 1(1) of the RHC. Here, the defendants had filed an unconditional appearance and had applied and obtained the order to name the defendants as a party to the present action by filing numerous affidavits. These were steps consistent with the principles of waiver.

Miscellaneous Grounds

Lest I be accused of an oversight, the defendants cited the case of *Shaheen bt Abu Bakar v. Perbadanan Kemajuan Negeri Selangor & 2 other cases* [1996] 2 CLJ 965 to argue that the court there held that there were triable issues solely on the basis that the appellant there may have been on the land with the acquiscence of the owner. With respect, that was a misreading of *Shaheen's* case. Gopal Sri Ram JCA in delivering the judgment of the Court of Appeal in *Shaheen's* case analysed the law lucidly in these words:

> Now, Order 89 has its origins in the English RSC. Order 113 with which it is in *pari materia*. Cases decided in England and the comment upon the corresponding English rule of court are therefore of assistance when considering the scope and application of Order 89. But in the final analysis, courts in this country must bear in mind the peculiar circumstances that prevail here and should therefore apply the order to meet these circumstances.
>
> In my judgment, it would be quite wrong for our courts to apply, without question or qualification, the views expressed by English Judges or commentators, however eminent, to cases that arise before them under parallel provision of written law without addressing the circumstances that prevail in this country. Especially is this so in cases involving the practice and procedure of our courts, where the approach that we adopt may be at variance with that followed by Courts of England.
>
> Of course, if a view of the law that we take on a particular subject is similar to that expressed in an English case, it would be quite proper to cite that decision as authority for the proposition stated. But there should be no slavish adherence to English precedent.
>
> I have made these observations because we were during argument, referred by Counsel to a commentary by the editors of the *English Supreme Court Practice*, 1991 on the English RSC. Order 113 dealing with the scope of the order and the way in which it should be applied. The views expressed in the passages that were read by Counsel are unsupported by any authority.
>
> I certainly do not consider myself bound by these views and the course I propose to take is to make up my own mind about how Order 89 is to be applied, having regard to any judicial pronouncements of our courts in cases where the order has come up for consideration. There may, consequently, be a difference in the approach I take and that suggested by the editors of the Supreme Court Practice, but this is inevitable because of the circumstances that prevail in our jurisdiction.

Now, *Shaheen's* case involved three appeals that were heard simultaneously by the Court of Appeal. The first appellant was Shaheen bt Abu Bakar. Her case was rather weak as there was no active encouragement of the kind that was found in *Bohari's* case. The State Government too did not promise to issue title to her or her father. There were nothings to suggest that there was a consent or a licence given to her or her father by the State Authority. She and her father were considered as squatters on State land.

The second appellant in *Shaheen's* case was Ho Chong Yee who purchased a house on the subject land in 1980 from the vendor, who came onto the subject land in 1976. In her evidence she said that she expended money in rebuilding the house and converting it into a permanent structure. In May 1987 she applied for a TOL but failed to secure it. Gopal Sri Ram JCA described her entry upon the land as illegal and her continued occupation was infected with illegality. She was a plain squatter who cannot resist a summary application for possession.

The third appellant in *Shaheen's* case was Lee Yat Yee who went into occupation of the subject land in 1969. He applied for a TOL and was issued with a TOL in the name of his neighbour. Sometime in 1988 a TOL was issued in his name. There were no suggestions that the TOL would be enlarged to enable him to have a greater interest in the land nor was there a definite promise to issue him with a title thereto. There was no material for the Court of Appeal to infer either consent or licence for the third appellant to occupy the land in question.

On these facts, Gopal Sri Ram JCA in *Shaheen's* case held that each appellant was a squatter and the orders for possession against each appellant under O. 89 of the RHC was rightly and correctly made by the trial judge. In the present case, the result would also be the same. The initial entry on the property was with the licence or consent of the co-op but upon the death of the first defendant's parents, the continued occupation on the plot of land marked as "C31" in the layout plan became illegal. That illegality was contagious as it affected all the defendants. In law, the defendants here were mere squatters.

Next, the defendants argued that the originating summons in encl. 3 was defective as the plaintiff should claim vacant possession of the property instead of vacant possession of the house which did not belong to the plaintiff. This calls for a perusal of the affidavit in encl. 2 especially exhibit marked "WCT-3" to that enclosure which clearly showed the house in question standing on the property under dispute. Section 5(d) of the NLC defines land to include:

> all things attached to the earth or permanently fastened to any thing attached to the earth, whether on or below the surface;

and since the house was permanently fastened to the earth it became part and parcel of the land and the ownership thereof vested with the plaintiff *(Punca Klasik Sdn Bhd (No: 2) (supra))*. This was my judgment and I so hold accordingly.

Order Of Court Dated 29 September 1999 In Relation To Encl. 21

This was in relation to an application by way of a summons in chambers in encl. 21 filed by the plaintiff seeking to strike out and to be taken off the file and to destroy the second additional affidavit of Poongavanam a/l Vadivelu in encl. 22 that was affirmed in the month of September 1998 (the exact date not known as the empty space was unfilled) and filed on 17 September 1998. Enclosure 21 was worded as follows:

(a) menurut Aturan 41 Kaedah 6 Kaedah-kaedah Mahkamah Tinggi 1980 dan/ atau menurut kuasa-kuasa sedia ada Mahkamah:

(i) keseluruhan Afidavit Tambahan Kedua yang diikrarkan oleh Poongavanam a/l Vadivelu tanpa tarikh ("Afidavit Tambahan Kedua Defendan") dan difailkan di sini dibatalkan dan dikeluarkan dari fail Mahkamah dan dimusnahkan dengan serta merta; dan

(ii) kesemua salinan pejabat Afidavit Tambahan Kedua Defendan dimusnahkan dengan serta merta,

atas alasan-alasan bahawa Afidavit Tambahan Kedua Defendan:

(iii) telah difailkan tanpa mematuhi peruntukan Aturan 32 Kaedah 13 (2)(b) Kaedah-kaedah Mahkamah Tinggi 1980;

(iv) adalah mengaibkan, tak relevan dan akan melengahkan perbicaraan tindakan ini dengan adil; dan

(v) adalah suatu penyalahgunaan proses Mahkamah; dan

(b) kos permohonan ini sejumlah RM1,000.00 dibayar kepada Plaintif oleh Tetuan Nassir & Co., peguamcara Defendan-Defendan, dalam tempoh tujuh (7) hari dari tarikh perintah yang akan dibuat di bawah permohonan ini.

and it was supported by an affidavit of Goh Mey Foon in encl. 20 that was affirmed on 21 September 1998 and filed on the same date. By way of a reply to encl. 20, Yohevel a/l Esekimuthu affirmed an affidavit in reply on 25 September 1998 which was filed on 29 September 1998 as reflected in encl. 23.

Enclosure 22 was filed after the parties had submitted at great length in regard to encl. 3.

Enclosure 22 contained two exhibits marked as "P1" and "P2" respectively and both these two exhibits were sale and purchase agreements which did not involve the plaintiff and it related to a different property. The first sale and purchase agreement marked as "P1" in encl. 22 was entered between Nalmas Development Sdn Bhd with Gadini Sdn Bhd on 16 June 1991 in relation to the sale of a piece of land known as EMR 453 for Lot 388 in the Mukim of Plentong, district of Johor Bahru, State of Johore containing an area of 9 acres 3 roods 18 poles. The second sale and purchase agreement marked as exhibit "P2" in encl. 22 dated 22 July 1996 between Gadini Sdn Bhd and Kelana Sehati Sdn Bhd was also in relation to the same piece of land as in exh. "P1" in encl. 22. The present property, as I said in the early part of this judgment, is held under CT 2733 Lot 2103 in the Mukim of Plentong, district of Johor Bahru, State of Johore measuring 53 acres 3 roods 20 poles and clearly it is a different property from that of exhs. "P1" and "P2" in encl. 22. No wonder Madam Mathimugam Karuppanan for the defendants rightly conceded that exhs. "P1" and "P2" of encl. 22 were not relevant to the case. The notes of evidence bore out the stand adopted by Madam Mathimugam Karuppanan and this was what she said:

> I agree exhibit P1 and exhibit P2 of enclosure 22 not relevant to the case. It should not be incorporated at all. It is irrelevant. Now, I agree with enclosure 21. I leave it to Y.A. I know it is difficult to surmount enclosure 21. I say that the court should allow enclosure 21. We are going on an uphill task.

Order 41 r. 6 of the RHC states that the court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive. It goes without saying that an affidavit must be pertinent and material and may be ordered to be taken off the file if scandalous and irrelevant matters are inserted therein (*Osmaston v. Association of Land Financiers* [1878] WN 101; *Kernick v. Kernick* 12 WR 335; *Goddard v. Parr* 3 WR 633; and *Cracknall v. Janson* 11 Ch. D p. 12). The court too is empowered to expunge a scandalous matter from the affidavit (*Warner v. Mosses* [1881] WN 69]. It is pertinent to note that the court will only strike out matters that are both scandalous and irrelevant, or are otherwise oppressive (per Buckley LJ in *Re Jessop* [1910] W.N. 128). The plaintiff in encl. 21 sought for the whole affidavit in encl. 22 to be taken off the file and destroyed; and the court certainly has the power in a proper case to order its immediate destruction (*Re F.*, [1913] WN 4). The case of *Rossage v. Rossage And Others* [1960] 1 All ER 600 CA is of great interest as it is both invigorating and refreshing. In that case the mother of a child applied to strike out certain affidavits, filed on the child's father's application to suspend her access to the child, on the ground that the affidavits were scandalous and irrelevant. Three of the affidavits contained plenty of hearsay evidence as well as some relevant material. The trial judge ruled that the hearsay was irrelevant and

inadmissible, but refused the application to strike out on the ground that he was quite capable of shutting his mind to the irrelevant matter. On appeal by the wife the husband contended, *inter alia*, that as the proceeding was interlocutory an affidavit might contain, by virtue of the proviso to RSC O. 38 r. 3 "statements of information or belief with the sources and grounds thereof." The court held, *inter alia*, that as the hearsay evidence was inadmissible and irrelevant, and, as the proportion of that material to the relevant material was so high, the three affidavits should be removed from the file. Hodson LJ delivering the judgment of the court (with whom Ormerod and Willmer LJJ agreed) said at p. 601 of the report:

> There are five affidavits, which the court has read, and as to the last two there is, I think, no ground for saying that the contents of those affidavits are irrelevant. The gist of the application really relates to the three other affidavits – an affidavit by the father of the child and two affidavits by the managing clerk to the firm of solicitors instructed by him. Those affidavits contain material which is relevant, but contain also a great deal of material which is irrelevant – pure hearsay evidence which the court cannot take into account in the form in which it stands. The proportion of that material to the relevant material is so high that if this matter is to be disposed of with any regard to convenience it is clearly right that the whole of those affidavits should be removed from the file rather than by seeking, by expunging irrelevant matter, to put the affidavits in order.

In another part of the judgment, Hodson LJ said (see p. 602):

> However, he said he was not going to remove it from the file because he was quite capable of shutting his mind to the irrelevant matter. I do not think that that is a sufficient answer to the application in this case. The peril of leaving the affidavits on the file is indicated by the passage in COTTON, L.J.'s judgment which I have read; and indeed it makes it almost impossible for the mother in this case to answer the affidavits unless they are purged of the irrelevant and indeed scandalous matter.

Finally, in the second last part of the judgment, Hodson LJ remarked at p. 602:

> Within the meaning of those two rules, I am clearly of opinion that these matters are irrelevant and scandalous, and therefore they ought to be struck out. The court ought not to be embarrassed by their presence on the file; nor ought the party whom these statements tend to implicate to be embarrassed by having to deal with them.

In *Oh Kuang Liang v. Associated Wood Ind Sdn Bhd* [1995] 4 MLJ 390 at pp. 392 to 393, I said the following:

> Order 41 rule 6 of the Rules of the High Court 1980 ('RHC') reads as follows:
>
> > The Court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive.

> *Osmaston v. Association of Land Financiers* [1878] WN 101 and *Rossage v. Rossage* [1960] 1 WLR 249; [1960] 1 All ER 600, lay down an inflexible rule that an affidavit must be pertinent and material and may be ordered to be taken off the file if scandalous and irrelevant matter is inserted. Even, at times, scandalous matter may be expunged (*Warner v. Mosses* [1881] WN 69). But it is not necessary for the court to strike out the whole affidavit; sufficient if the court strikes out only those parts which are scandalous, irrelevant or otherwise oppressive.

and it must surely apply to the facts of the present case and when so applied, I am prepared to go to the extreme and make the crucial order that the whole affidavit in encl. 22 to be taken off the file and destroyed. Incidentally, *Oh Kuang Liang's* case was also reported in two other notable local journals: CLJ JT(18) 1995, [1995] 2 CLJ 961 and [1995] 2 AMR: 1873. Enclosure 22 was, in my judgment, scandalous and irrelevant. The end result was obvious. I granted the plaintiff's application in encl. 21 and awarded costs in the sum of RM500 in favour of the plaintiff to be paid by Messrs Nassir & Co, the solicitors for the defendants, and such sum payable within seven days from the date of this order.

Conclusion

For the reasons adumbrated above, I granted the prayers sought for in encl. 3 particularly prayers (a), (b), and (c) thereof.